Nos. 12,300 and 12,301

IN THE

United States Court of Appeals

For the Ninth Circuit

WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, and JEAN LANE, individually and as Chief of Police of the County of Maui, *Appellants,* vs. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a voluntary unincorporated association and labor union, et al., *Appellees.*	No. 12,300
WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, *Appellant,* vs. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a voluntary unincorporated association and labor union, et al., *Appellees.*	No. 12,301

Upon Appeal from the United States District Court for the District of Hawaii.

APPELLANTS' REPLY BRIEF.

WALTER D. ACKERMAN, JR.,
Attorney General, Territory of Hawaii,
J. GARNER ANTHONY,
Special Deputy Attorney General,
RHODA V. LEWIS,
Assistant Attorney General,
RICHARD K. SHARPLESS,
Deputy Attorney General,
Attorneys for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Statutes

Other Authorities

Nos. 12,300 and 12,301

IN THE

United States Court of Appeals

For the Ninth Circuit

WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, and JEAN LANE, individually and as Chief of Police of the County of Maui, *Appellants,* vs. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a voluntary unincorporated association and labor union, et al., *Appellees.*	No. 12,300
WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, *Appellant,* vs. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a voluntary unincorporated association and labor union, et al., *Appellees.*	No. 12,301

Upon Appeal from the United States District Court for the District of Hawaii.

APPELLANTS' REPLY BRIEF.

I. THE DECREES APPEALED FROM STAYED PENDING CRIMINAL PROSECUTIONS IN VIOLATION OF THE STATUTORY PROHIBITION.

The decrees below stayed four criminal proceedings then pending in the territorial courts[1] in violation of the act of Congress which commands that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. (Title 28, U.S.C. sec. 2283; formerly Judicial Code, sec. 265, 28 U.S.C. 379.)

(1) Section 2283 governs the relationship between the federal and territorial courts in Hawaii.

The statutory prohibition is binding on the United States District Court for the District of Hawaii and the Court below so held. (R. 469.) Appellees do not deny that the statute has the same effect in Hawaii as elsewhere in the United States.

Section 86 of the Hawaiian Organic Act[2] is an adoptive statute of the type construed in *Balzac v. Porto Rico*,[3] and section 2283 clearly is one of the statutes thereby adopted and made applicable to

---

[1]Unless otherwise indicated record references are to No. 12300 in this Court or to the consolidated record Nos. 12300-12301. The Court below disposed of two cases in one opinion. (R. 370-520.) Separate decrees were entered on March 29, 1949, the decree in No. 12300 (R. 543-550) stayed Cr. Nos. 2412, 2413 and 2419, the decree in No. 12301 (12301, R. 89-96) stayed Cr. No. 2365.

[2]The amendments of Section 86 made upon the enactment of the Revised Title 28 were not substantial. They are reviewed in the appendix of the Opening Brief (p. 167).

[3]258 U.S. 298, 302. (Op. Br. pp. 167-168.)

Hawaii. As this Court held in *Alesna v. Rice,* 172 F. 2d 176, 179 (1949):

> A result of Section 86(c) is that if a constitutional district court is precluded by statute or rule of law from interfering in state court proceedings similar to the proceedings in which this Rice order was issued, the United States District Court for the District of Hawaii is precluded from interfering with the territorial court proceedings. Section 86(d) has the same effect.
>
> This court has recognized that the Organic Act places the courts of the Territory of Hawaii in a relatively similar position to the federal judicial system as are the state courts.

The purpose of Section 2283 is to preclude interference of United States District Courts in state court proceedings. It arose from the necessity of preventing friction between parallel systems of courts.[4]

Even without reference to the adoptive statute, the Supreme Court has construed the word "state" to include territories where, as here, such construction will carry out the policy of the statute.[5]

If the word "state" were an obstacle to the applicability of this statute in Hawaii then it would be equally so as to Title 28, Section 1343 (conferring jurisdiction on district courts in cases brought "to redress the deprivation, under color of any State law" of the civil rights of a citizen) and the cases would

---

[4] *Oklahoma Packing Co. v. Gas Co.*, 309 U.S. 4, 8-9 (1940); *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 129 (1941).

[5] *Waialua Co. v. Christian*, 305 U.S. 91, 109 (1938); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 383 (1949).

require reversal for lack of jurisdictional amount on the part of the individual appellees, the parties interested in the pending territorial criminal proceedings.

The Court below tied the applicability of Section 2283 in Hawaii to that of Section 2281, the three-judge court statute. (R. 468.) Likewise, the Court based its holding that Section 1343 applied upon the reasoning supporting the applicability of Section 2281. (R. 436.) Section 2281 (the three-judge court statute) was held inapplicable to the Territory of Hawaii in *Stainback v. Mo Hock Ke Lok Po* because of the long established rule of strict construction of that section, to avoid burdening the federal judicial system. The reasoning of the opinion signifies no rejection of the principles which call for applicability of Section 2283. On the contrary, the Supreme Court sustained the independence of the territorial courts, holding that "territorial like state courts, are the natural sources for the interpretation and application of the acts of their legislatures and equally of the propriety of interference by injunction" (336 U.S. 383). Professor Moore in his recent treatise on the judicial code, recognizes that although 2281 is not applicable to Hawaii, 2283 is.[6]

(2) Section 2283 is prohibitory.

The statutory command is that "a court of the United States may not grant an injunction to stay proceedings in a state court * * *". Appellees (Brief 38-9) attempt to support the position taken by the

[6]Moore's Judicial Code 407 (1949).

Court below (that despite the statute the Court in its discretion could enjoin the pending proceedings) by quoting a paragraph from a law review article[7] which does not support them; the authors take the position that where a stay of pending state proceedings is sought in a Federal Court, the Court must make an inquiry on the merits to determine whether or not the case falls within an exception to the statute. *Smith v. Apple,* 264 U.S. 274 (1924), which is cited in the footnote to the passage quoted by appellees, holds that although the statute is not a jurisdictional statute it does prevent "granting relief by way of injunction in the cases included within its inhibitions" (264 U.S. 274 at 478).

In *Toucey v. New York Life Insurance Co.* (supra), decided several years after the cited article and cases, the Supreme Court stated that the statute was prohibitory, and since the enactment of Revised Title 28 has reiterated its prohibitory character "Title 28 U.S.C. No. 2283 forbids this exercise of power * * * ."[8]

The cases[9] cited by the appellees and the Court below (Brief 17-18, 39-40, R. 471-475) as supporting the Court's discretion to ignore the command of the statute, deal with threatened future proceedings[10] as

---

[7]Taylor & Willis, Federal Injunctive Power, 42 Yale L. J. 1169 (1933).

[8]*Callaway v. Benton,* 336 U.S. 132, 150 (1949).

[9]E.g. *Douglas v. Jeannette,* 319 U.S. 157 (1943), *Hague v. C.I.O.,* 307 U.S. 496 (1939), and *A.F.L. v. Watson,* 327 U.S. 582 (1946).

[10]In so far as the cases cited relate to criminal proceedings they are future threatened proceedings; even though in some of them arrests had occurred no injunctions were sought as to pending proceedings, see the cases in note 90 of the Opening Brief, pp. 184-187.

distinguished from pending proceedings, and hence are not in point. The statute applies to pending proceedings.[11] Pending proceedings cannot be enjoined even if further enforcement of the statute could be enjoined.[12]

(3) These cases do not come within any exception to the statute.

In *Toucey v. New York Life Insurance Co.* (supra), Justice Frankfurter undertook a comprehensive review of the exceptions to Section 2283. He listed five statutory "withdrawals" from the "sweeping prohibition" of the section (314 U.S. 118, 132-134). It will be noted that no mention is made of the Civil Rights Act (8 U.S.C. sec. 43; 28 U.S.C. sec. 1343) as being such an exception although the act antedated the case by some seventy years. Appellees cite no authority for such an exception, mistakenly relying on the cases of future threatened proceedings (Brief, p. 43). There is ample authority[13] holding that the Civil Rights Act is not a statutory exception. Certainly the Civil Rights Act does not "expressly"[13a] authorize an injunction to stay state court proceedings since it provides that jurisdiction "shall be exercised and enforced in conformity with the laws of the United

---

[11]*Ex parte Young*, 209 U.S. 123, 161 (1908); 42 Yale L. J. 1169, 1191; 43 Harv. L. Rev. 345, 375.

[12]*Cline v. Frink Dairy Co.*, 274 U.S. 445, 452-453 (1927); *Ex parte Young*, supra; *Camden Interstate Ry. v. City of Catlettsburg*, 129 Fed. 421 (1904); *St. Louis & S. F. R. R. v. Allen*, 181 Fed. 710, 722 (1910); Op. Br. pp. 84, 86.

[13]See cases collected in our Opening Brief, pp. 88-90, but see contra *Cooper v. Hutchinson* (C.A. 3d), 19 L.W. 2050, decided July 21, 1950.

[13a]See Section 2283.

States".[13b] Moreover, the Supreme Court has interpreted the Civil Rights Act as not allowing a suit in equity if, under preexisting standards, it was not a proper proceeding.[13c] And since the denial of any constitutional right comes within the scope of the Civil Rights Act, the Supreme Court's holding that the statutory prohibition is not lifted by an attack on the constitutionality of a state statute[13d] or by other alleged denials of constitutional rights[13e] is decisive.

As to the so-called judicial exceptions to the act, Justice Frankfurter in the *Toucey* case stated:

> We find therefore that apart from congressional authorization only one exception has been imbedded in section 265 by judicial construction, to wit the *res* cases. The fact that one exception has found its way into section 265 is no justification for making another. (314 U.S. 118, 139.)

When the present Section 2283 was enacted certain changes in wording were made, the effect and

---

[13b] R.S. 722, now 8 U.S.C. 49a (contained in March 1949 supplement), formerly 28 U.S.C. 729. This section requires conformity to federal law when there is a federal rule governing the case, and allows resort to the common law only when there is no such federal rule. *United States v. Thompson*, 251 U.S. 407, 416 (1920). Moreover, the common law rule, as shown in Point II, infra, does not allow equitable intervention in pending criminal proceedings.

[13c] *Giles v. Harris*, 189 U.S. 475, 486 (1903).

[13d] See cases cited in note 12 and *Monamotor Oil Co. v. Johnson*, 292 U.S. 86, 97 (1934).

[13e] *Essanay Film Co. v. Kane*, 258 U.S. 358, 361 (1922), where the Supreme Court said, referring to the section of the judicial code which is now Section 2283:

> That appellant's objection to the action sought to be restrained rests upon a fundamental ground and one based upon a provision of the Constitution of the United States, does not render the effort to stay proceedings in the state court any the less inconsistent with § 265, Judicial Code. * * *

intention of which are set forth in the Reviser's Notes.[14] The only change in substance[14a] was to restore statutorily the relitigation exception struck down by the *Toucey* decision (supra).

The Court below considered material, in deciding whether it would exercise discretion to depart from the statute, the impact of the criminal statute on labor relations, the motives of the prosecution, and the Civil Rights Act. (R. 480, 483.) But as we have shown the Court possesses no discretion to depart from the statute save for cases falling within the *res,* relitigation and statutory exceptions. The *res* and relitigation exceptions are not involved, and the Civil Rights Act is not one of the statutory exceptions. Neither the motives of the prosecution nor the impact of the statute on labor relations is material in any event.[14b] Hence there is no exception to the statute preventing its application to these cases.

---

[14]U.S. Code Cong. Service, Title 28, sec. 2283, Reviser's Notes p. 1910.

[14a]See Opening Brief, p. 87, note 67.

[14b]See Opening Brief, pp. 97-99, 103-133; there is no exception to the statute in cases involving motive or labor controversies. Moreover, on these matters the District Court committed flagrant error in its findings. This was the result of a gross distortion of the doctrine of judicial notice. The Court took "judicial notice" of highly controversial facts not presented except in the unsworn memorandum of counsel. Appellees realizing the insufficiency of the record have again in this Court attached to their brief the same memorandum, which they offer as a substitute for proof. Judicial notice, of course, cannot be used as a substitute for evidence on controversial issues of fact, Morgan, Judicial Notice, 57 Harv. L. Rev. 269 (1944).

(4) The decrees below violated Section 2283.

In *Hill v. Martin,* the Supreme Court said:

> The prohibition of section 265 (now 2283) is against a stay of 'proceedings in any court of a state'. That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of final process.[15]

The Supreme Court cited *Hyattsville Building Assn. v. Bouic,*[16] and *United States v. Collins,*[17] which was applied in *Yick Wo v. Crowley,*[18] a case holding that the statute prohibited a Federal Court from restraining the service of a state Court warrant of arrest.

The four criminal proceedings enjoined by the decree below were commenced by the issuance of warrants on police complaints following which the defendants were preliminarily arraigned before a district magistrate and committed to the circuit court of the County of Maui for further action in accordance with the appropriate statutes. (R. 88-93, 93-99, 138-323, 1282-1283.) This procedure is authorized by statute, Section 10770, Revised Laws of Hawaii 1945, and is often used as an alternative to the issuance of a bench warrant after indictment.[19] A proceeding so

---

[15]296 U.S. 393, 403 (1935).
[16]44 App.D.C. 408 (1916).
[17]Fed. Cas. 14834 (1858).
[18]26 Fed. 207 (1886).
[19]*United States v. Simon,* 248 Fed. 980 (1916); *Garrison v. Johnston,* 104 F.2d 128 (C.A. 9th, 1939).

commenced is pending although no indictment has been returned.[20]

In No. 12300 filed December 1, 1947, the decree enjoins "the prosecution commenced July 16, 1947 (R. 548)", "the prosecution commenced July 15, 1947 (R. 549)", and "the prosecution commenced August 1, 1947 (R. 549)"; in No. 12301 filed December 31, 1947, the decree enjoins "the prosecution commenced in October 1946" (No. 12301, R. 95). These injunctions clearly violate Section 2283 and must be reversed.

(5) The statute cannot be circumvented by calling the relief "declaratory".

Appellees, to escape the force of the statute, make the argument (Brief, pp. 23, 74) that the relief sought by them as to the grand jury "is declaratory and not injunctive." It is well settled that the declaratory judgment act cannot "be used to give relief indirectly which could not be given directly".[21] This was established in *Great Lakes Co. v. Huffman,*[22] which involved a statute analogous to Section 2283, forbidding federal court interference with state procedures for collecting taxes and limiting attacks on a state tax act to the recovery of the tax after it has been paid. The Court held that the policy underlying the statute required a like restraint in the use of the declaratory judgment procedure and made it the duty of the Court

---

[20] *Southern Surety Co. v. Oklahoma,* 241 U.S. 582, 587 (1916).
[21] *Clark v. Memolo,* 174 F.2d 978, 980 (App. D.C. 1949).
[22] 319 U.S. 293 (1943).

to withhold this type of relief. (319 U.S. at pp. 299, 301.)

Even as to federal criminal proceedings an action for declaratory relief cannot be used as a substitute for the traditional means of determining the constitutional issues in the criminal cases, i.e. by a motion in the criminal court or petition for habeas corpus.[23] Clearly if the declaratory judgment procedure could be used to litigate each constitutional issue in a criminal case the case would be subject to innumerable interruptions and the criminal courts could not function.

II. THE DECREES BELOW VIOLATE THE SETTLED PRINCIPLE THAT EQUITY WILL NOT INTERFERE WITH PENDING CRIMINAL PROCEEDINGS.

The policy behind Section 2283 (that of preventing friction between the parallel state and federal systems of courts) applies to all proceedings criminal and civil. But where the proceeding sought to be enjoined is criminal, the further rule that "courts of equity * * * will not interfere to stay proceedings in any criminal matters, or in any cases not strictly of a civil nature"[24] applies. This principle of equity jurisprudence has not been changed by the Civil Rights Act which "does not extend the sphere of

---

[23] *Clark v. Memolo*, supra; *Valenti v. Clark*, 83 F.Supp. 167 (D.D.C. 1949); *Brown v. Royall*, 81 F.Supp. 767 (D.D.C. 1949), cert. denied 339 U.S. 952.

[24] 2 Story's Equity Jurisprudence, 10th Ed., 1873, sec. 893; *In re Sawyer*, 124 U.S. 200, 210 (1888); *Harkrader v. Wadley*, 172 U.S. 148, 170 (1898).

equitable jurisdiction in respect of what shall be held an appropriate subject matter for that kind of relief".[25] Lacking jurisdiction to intervene in pending criminal proceedings, an equity court's exercise of discretion is confined to future threatened proceedings. In *Babcock v. Noh,* 99 F. 2d 738 (C.A. 9th 1938), a district Court had restrained the prosecuting attorney of Twin Falls County, Idaho, from proceeding with the pending prosecution of the plaintiff. In reversing the decree this Court said:

> In support of the decree appellee argues broadly that a court of equity may enjoin a criminal prosecution under a void statute where such prosecution amounts to a wrongful invasion of a property right (citing cases). However, the present suit is not within the principle announced in these authorities. What was sought in those cases was relief against threatened, not pending, prosecutions; and in them the court proceeded upon the view that one is not compelled to test the constitutionality of an act by first incurring drastic penalties attached to its violation, but may, under extraordinary circumstances, appeal to equity for relief against the invasion of his property rights through the threatened enforcement of the statute. * * * Here, no threat of the institution of other criminal proceedings under the act is alleged in the bill or found to have been made. The relief sought is against the further prosecution of the pending case. * * *
>
> The constitutional question said to be for determination by the Federal court is one which

[25] *Giles v. Harris,* 189 U.S. 475, 486 (1903).

> the state court is competent to deal with in the criminal action pending before it. Its decision of the federal question is subject to ultimate review in the Supreme Court of the United States. There is plainly no warrant for equitable interference with the proceedings in the state tribunal, even in the absence of the prohibition against such interference contained in section 265 of the Judicial Code, 28 U.S.C.A. section 379. (99 F. 2d pp. 739-740.)

While equity will not interfere in criminal proceedings, such proceedings are subject to attack by a writ of habeas corpus. However, under the exhaustion of remedies rule the Supreme Court has rounded out the policy of section 2283[26] by limiting federal habeas corpus interference with state criminal cases. The rule requires that all issues in state criminal cases first be presented in the state courts, then appealed all the way through the proper appellate courts and certiorari asked in the United States Supreme Court before a writ of habeas corpus will be entertained in a federal district court.[27] The rule is binding on the lower courts, subject to only a few exceptions for cases involving the operations of the federal government, the authority of its officers, and foreign relations. (Op. Br. pp. 91-92, 105-106.) The Supreme Court is unwilling to create further exceptions. *Dye v. Johnson,* 338 U.S. 864 (1949), reversing *Johnson v. Dye,* 175 F. 2d 250 (1949).

---

[26] *Darr v. Burford,* 339 U.S. 200, 204 (1950), footnote 10.
[27] *Darr v. Burford,* supra.

By reason of section 2283, the lack of equity jurisdiction over criminal proceedings, and the exhaustion of remedies rule, the protection of state criminal courts against federal court interference is complete. The decrees below were issued in violation of the established rule of non-interference and should therefore be reversed.

III. THESE CASES INVOLVE NO FUTURE PROSECUTIONS.

As these cases stand today they involve no possibility of future prosecutions, the statutes having been amended. (Op. Br. p. 92.) But even in the Court below it was true that no future prosecutions were involved. (Op. Br. pp. 92-99.) The Court issued no injunctions against future prosecutions. (R. 12300, pp. 543-550; R. 12301, pp. 89-96.)

No further prosecutions could be involved unless they were threatened;[28] the complaints below did not allege such threats,[29] and no evidence of such threats was introduced. (R. 12300, pp. 2-21, 33; 12301, pp. 2-26.)

For the cases to involve threats of further prosecutions, moreover, the threats would have to be directed

---

[28] *Watson v. Buck*, 313 U.S. 387, 400 (1941), injunction proceedings; *Southern Pacific Co. v. Conway*, 115 F.2d 746 (C.A. 9th 1940), declaratory judgment proceedings; *Hoffman v. O'Brien*, 88 F.Supp. 490, 493, aff'd 339 U.S. ..... (May 15, 1950), declaratory judgment and injunction proceedings.

[29] Compare the allegations with those in *Hoffman v. O'Brien*, supra.

against the union's peaceful picketing activities. Mere allegations of unconstitutionality of a statute are not enough; the threatened interference must impinge upon the enjoyment of some property right or personal right.[30] Of course the right asserted must be one recognized as entitled to protection.[31] And since the jurisdiction of the District Court is founded upon the Civil Rights Act,[32] such right must by the terms of the statute be one protected by the Constitution or laws of the United States.

The acts for which the union claimed protection were "certain lawful, peaceful and constitutionally protected activities of speech, press and assemblage and of peaceful picketing" (R. 12300, p. 9; 12301, p. 13). But there was no proof of interference, actual or threatened, with such activity. No showing was made that the statutes were being so used as to prevent resort by labor to any recognized legitimate weapons in its armory.

---

[30] *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 99 (1949), injunction proceedings; *National Maritime Union v. Herzog*, 78 F.Supp. 146, 154, aff'd 334 U.S. 854 (1948), injunction proceedings; *United Public Workers v. Mitchell*, 330 U.S. 75, 89-91 (1947), declaratory judgment and injunction proceedings; *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 324 (1936), declaratory judgment and injunction proceedings; 28 Am.Jur. Injunctions 369, sec. 182.

[31] Cf. *Earle C. Anthony Inc. v. Morrison*, 83 F.Supp. 494 (1948), aff'd 173 F.2d 897 (C.A. 9th, 1949), cert. denied 338 U.S. 819 (1949); *Drummond v. Rowe*, 155 Va. 725, 156 S.E. 442 (1931); 39 Ill. L. Rev. 144, 146; 51 Harv. L. Rev. 623; 175 A.L.R. 438, 447.

[32] Section 1343 of Revised Title 28 (formerly section 24(14) of the Judicial Code, 28 U.S.C. 41(14)). The same is true if jurisdiction is founded on section 1331 of Revised Title 28 (formerly section 24(1) of the Judicial Code, 28 U.S.C. 41(1)), or on section 1347 (formerly section 24(8) of the Judicial Code, 28 U.S.C. 41(8)).

The findings of the Court below (R. 391-395, 402-405, 408), as to the acts out of which the four criminal proceedings arose, refute completely any claim that they were the kind of activity for which protection was claimed in the complaint. The conduct of appellees, to summarize the Court's detailed description of the events, can best be characterized as consisting of mass force, threats of violence, and violence. Thus, nothing in these cases afforded any basis for the inference that the union would in the future be interfered with in its exercise of peaceful picketing.

Appellees' assertion that "a person has the right not to be arrested and prosecuted under laws that abridge freedom of speech", even if he has committed an assault (Ans. Br. p. 29) does not take into account the question of where the right is asserted. This was the error that the trial Court fell into (R. 485). Of course, a person guilty of acts of violence can, in the criminal proceedings, both at the trial and on appeal, assert the invalidity of the statute as a defense,[33] but equity will grant him no protection in perpetrating further acts of violence.[34]

---

[33]Appellees' hypothetical case does not disclose how good the defense would be. Even if a statute, in some aspects, abridges freedom of speech, there still remains the possibility that it can be constitutionally applied in the particular criminal proceeding involved. See *Dorchy v. Kansas*, 272 U.S. 306, 309 (1926); *Stromberg v. California*, 283 U.S. 359, 367-368 (1931); *Thomas v. Collins*, 323 U.S. 516, 541 (1945); *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949); see also *Thornhill v. Alabama*, 310 U.S. 88, 96 (1940); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-573 (1942).

[34]In view of the fact that in the opinion of the Court below the question here discussed (whether the union had shown threatened interference with the kind of activity, i.e. peaceful picketing, for

The requirement of a showing of threatened interference with property rights or activities claimed to be constitutionally or legally protected is separate and apart from the requirement, standard in all equity cases, of a showing of irreparable injury and the additional requirement in cases to enjoin enforcement of state statutes of a showing of exceptional circumstances. The first requirement naturally must be met before the Court is called on to consider the other two requirements. In *A.F.L. v. Watson,* supra, the activity claimed to be protected by the Constitution and laws of the United States was the making of closed shop contracts.[35] In *Douglas v. Jeannette,* supra, it was the distribution of religious literature. In our case, however, the right asserted, to come within the scope of the interference shown, would have to be a right to use mass force and violence, which obviously is not a right. On the other hand, the statutes had not been invoked against peaceful picketing, hence it could not be inferred that interference with that activity was threatened. The requirement of a threat to interfere with constitutionally protected rights has not been met and the Court below erred in entertaining these cases.

---

which protection was sought in its complaint) appears under the heading "the defense of unclean hands" (R. 485), it is relevant to note that appellants had moved to dismiss on the ground the union was not so threatened (No. 12300, p. 125; No. 12301, p. 62; motion renewed R. 1570), as well as on the ground of unclean hands. As to the latter ground, see Op. Br. pp. 100-103.

[35]The district court was ordered to stay proceedings to await state court determination of the questions of local law. Ultimately the making of closed shop contracts was held not protected by the laws of the United States. *Algoma Plywood v. Wisconsin Board,* 336 U.S. 301 (1949).

IV. THE COURT ERRED IN INVALIDATING THE STATUTES AND THE GRAND JURY.

A.

THE UNLAWFUL ASSEMBLY AND RIOT STATUTE.

(1) The court below had no authority to reconstrue the unlawful assembly and riot statute.

The rule is that the interpretation of a state statute is a matter of local law, and that the federal question begins only with the statute as authoritatively interpreted by the local Court. Had the Court below abided by this rule, and accepted the Supreme Court of Hawaii's construction of the statute, it could not have reached the result it did on the constitutional issues.

Appellees nullify this rule when they state: "Federal courts are not bound by the construction placed on a statute where the question is a question of conflict with the federal constitution" (Brief, p. 67). This is the exact opposite of the correct rule.[36]

Appellees also assert that the interpretation placed on the statute by the Supreme Court of Hawaii was "manifestly erroneous" (Brief, p. 68). They fail to recognize that the appellate jurisdiction enjoyed by this Court in cases of clear or manifest error in matters of local law, such as interpretation of a territorial statute, does not pertain to the Federal District Court.[37]

---

[36] *A.F.L. v. Watson*, 327 U.S. 582, 598, *Musser v. Utah*, 333 U.S. 95, 98 (1948), and other cases cited in our Opening Brief, pages 54-56; see also the recent case of *Shipman v. Dupre*, 339 U.S. 321 (1950).

[37] See our Opening Brief, note 27, pages 172-173.

As to the parties in the *Kaholokula* case, more than the interpretation of the territorial statute is involved. The Supreme Court of Hawaii's upholding of the constitutionality of the statute established the law of the case which the Circuit Court must follow. To be sure, this Court might reverse the Supreme Court of Hawaii but the United States District Court may not.[38] Nor should the "congressional policy against piecemeal appeals in criminal cases" be thwarted.[39]

(2) Appellees' argument that: "The act is unconstitutional on its face."

Appellees draw a distinction between the statute "on its face" and as interpreted by the Supreme Court of Hawaii (Brief, pp. 59 and 65). There is no such distinction to be made. As shown by *Toomer v. Witsell,*[40] a Federal District Court having before it a statute which has not been construed by the State Court has to decide whether the statute requires interpretation by the State Court before the Federal District Court can pass on the constitutional issue; the considerations which influence its determination are set forth in *Railroad Commission v. Pullman Co.,*[41] and *A.F.L. v. Watson.*[42] Here no such problem was presented; the statute had been construed. The question was whether the statute as so construed was con-

---

[38]*Borland v. Johnson,* 88 F.2d 376 (C.A. 9th, 1937), cert. denied 302 U.S. 704, and other cases cited in our Opening Brief, pages 53-54.

[39]*Roche v. Evaporated Milk Assn.,* 319 U.S. 21, 30.

[40]334 U.S. 385, 392, note 15, cited Brief, page 59.

[41]312 U.S. 496, 499-500 (1941).

[42]327 U.S. 582, 595-599 (1946).

stitutional. When *Chaplinsky v. New Hampshire,*[43] in which the opinion was written by Mr. Justice Murphy, is contrasted with *Thornhill v. Alabama,*[44] it appears that the *Thornhill* case does not hold State Court construction may be ignored. The case is one of a group holding that where a person has been convicted upon a record which demonstrates a too broad construction of the statute, so that his punishment may be attributable to acts which under the Constitution cannot be punished, the presence in the record of evidence of unlawful acts which under the Constitution may be punished will not save the judgment.[45]

Appellees argue that the unlawful assembly and riot statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it", quoting from *Watson v. Buck,* 313 U.S. 387 (1941), where it is said to be conceivable that there might be such a statute (Brief, p. 59). Appellees make no endeavor to support this argument by reference to the various provisions of the statute. Appellees' argument (Brief, p. 64, where Professor Chaffee's book is misconstrued) in substance is that the crime of riot cannot exist under the Constitution of the United States, because the existence of an assembly is a constituent element of the offense of riot.

---

[43]315 U.S. 568, 572-573 (1942).

[44]310 U.S. 88 (1940), cited by appellees. (Brief, p. 59.) The *Thornhill* case is the only one of the four cases cited by appellees in which the statute had been construed.

[45]Accord see: *Thomas v. Collins,* 323 U.S. 516, 541 (1945); *Stromberg v. California,* 283 U.S. 359, 367 (1931).

This argument is disposed of in *Cole v. Arkansas,*[46] which holds that the existence of an assembly may be an element of a criminal offense where the offense is confined to an assembly having an unlawful purpose and to persons who join in the promotion of that purpose. The relevant questions therefore have been met in the opening brief[47] where it is shown that: (1) Acts which create a clear and present danger of breach of the peace may be made unlawful, under the Constitution. (2) The Hawaii statute requires as an element of the offense "acts which strike or tend to strike terror into others", and therefore is confined to cases of clear and present danger of breach of the peace. (3) The statute prescribes a test of accountability which protects a person who does not join in the promotion of the unlawful acts; the statute is of the type sustained in *Cole v. Arkansas,* supra. Thus under the statute the accountability of each person is a question of fact, as held in *Whitney v. California,*[48] where the Supreme Court said the existence of such a question of fact presents no constitutional question.

(3) Asserted resemblance to statute of George I.

Appellees argue that the Hawaii statute is not the kind of statute above outlined, that it is the counterpart of the statute of George I (Brief, pp. 59-63). That statute, which made it an offense to fail to disperse upon an order to do so, is attacked by appellees

---

[46]338 U.S. 345 (1949), Op. Br. pp. 66-69.
[47]Op. Br. pp. 62-70.
[48]274 U.S. 357, 366-369 (1927), Op. Br. p. 69.

on the theory (Brief, p. 62) that the conferring of authority to order a dispersal is an interference with the right of assembly. There were two separate offenses in England, the distinguishing characteristics of which were that the common law offense made one accountable for the acts constituting the riot and had nothing to do with an order of dispersal, while the statutory offense made one accountable for his failure to disperse upon an order to do so.[49] In many of the states of the United States, as in Hawaii, these two separate offenses are contained in the statutes.[50] Sections 11570-11575 of the Hawaii statute,[51] as held by the Supreme Court of Hawaii, were based on the common law, not the statutory offense of failure to disperse. The dispersal provisions contained in sections 11576-11577 and 11581-11584 are not involved.

No order of dispersal appears in these cases; the giving of such an order was not averred in the criminal charges and the facts show none.[52] Therefore there is no need to complicate the issues by considering whether the dispersal provisions of the Hawaii statute (sections 11576-11577 and 11581-11584) are of the same type as those in the statute of George I. That they are not was shown in the opening brief.[53]

---

[49]Authorities explaining the common law offense and the statute of George I are cited in our Opening Brief, pages 57-59.

[50]See our Opening Brief, page 59, notes 32-34.

[51]The Hawaii statute is printed in the appendix of our Opening Brief, pages 188-192.

[52]See the resumé of the criminal charges in our Opening Brief, page 60, note 35.

[53]Op. Br. note 22b, pp. 170-172.

The dispersal provisions of the Hawaii statute are separable from the sections codifying the common law offense; this appears from the *Kaholokula* case in which the Supreme Court of Hawaii laid them aside as not involved. Severability is a question of local law.[54] Moreover, *United States v. Reese,* cited by appellees,[55] contains no holding that a penal statute prescribing several different ways in which a crime can be committed must stand or fall as a whole. To the contrary, the case recognizes that words may be struck out and that one part of the statute may be separated from the remainder, holding only that no such case is presented where, to effect the separation, it would be necessary to introduce words into the statute.

The Court below accepted the Supreme Court of Hawaii's holding that an order of dispersal was not an element of the offense involved (R. 450-451), but seems not to have understood that this necessarily stamped such offense as derived from the common law, not the statutory offense. The Court below ignored the existence of the common law offense (R. 444-452). This led the Court into further errors, in that, as shown below, the Court failed to interpret the terms of the statute in the light of the common law.

---

[54]Severability is a statutory construction question, hence a question of state law. *Rescue Army v. Municipal Court,* 331 U.S. 549, 573-574 (1947), and other cases cited in our Opening Brief, page 60.

[55]92 U.S. 214, 222 (1875), cited Brief, p. 66.

(4) Appellees' argument that the statute provides no ascertainable standard of conduct.

Appellees and the Court below (Brief, p. 64, R. 454) cite *Lanzetta v. New Jersey*[56] and *United States v. Cohen Grocery Co.*[57] for the proposition that the statute affords no ascertainable standard of conduct. In the *Lanzetta* case the Court pointed out that the meaning of the statute was not derivable from the common law (306 U.S. at p. 455). This also was true of the *Cohen Grocery Co.* case. In the Hawaii statute common law terms are employed; therefore the requirements of certainty are met.[58] Only by departure from this well established principle could the lower Court hold that the test laid down by the words "striking terror or tending to strike terror into others"[59] was "purely subjective", lacking "the test of reasonableness". (R. 453.)

B.

THE CONSPIRACY STATUTE.

Appellants' opening brief showed that the first portion of the conspiracy statute under which the offense of conspiracy is committed by a mutual undertaking "to commit any offense or instigate anyone thereto" is complete in itself and constitutional, that the lower Court made no objection to this first portion of the

---

[56]306 U.S. 451 (1939).

[57]255 U.S. 81 (1921).

[58]*Nash v. United States*, 229 U.S. 373, 376 (1913), as construed in *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926), and other cases cited in our Opening Brief, page 62.

[59]That these words have a well settled meaning at common law, encompassing the reasonable man test, was shown in our Opening Brief, pages 62-64.

statute, that this portion of the statute is involved in No. 12301 (the only case having to do with the conspiracy statute) and that the statute could not be struck down as a whole.[60]

Appellees, like the Court below, make no attempt to show the unconstitutionality of this first portion of the statute. They argue (Brief, p. 69) that the assaults and batteries which were the objects of the alleged conspiracy, were not fully carried out, which of course is not relevant to the offense of conspiracy.[61] The only other argument made is under the *Reese* case (Brief, p. 73) which as previously pointed out recognizes the rule that a penal statute separately setting out different ways in which an offense can be committed is severable. Appellees remark on the absence of a severability clause (Brief, p. 73). But the Hawaii Courts do not require a severability clause, and as above noted severability is a question of local law. The first and second portions of the statute clearly were severable.[62]

That the Court erred in invalidating the entire conspiracy statute can admit of no doubt. Criminal No. 2365 should have been allowed to proceed; if a conviction resulted the appellate court would consider whether it was based on an invalid portion of the statute.[63]

---

[60]Op. Br. pp. 72-74.

[61]11 Am.Jur. 546, sec. 6.

[62]*Territory v. Tam*, 36 Haw. 32, 51 (1942), relating to a statute in which there was no severability clause, and cases there cited.

[63]*Territory v. Tam*, supra; *Ex parte Bell*, 19 Cal.2d 488, 122 P.2d 22 (1942); *Stromberg v. California*, 283 U.S. 359, 367-368 (1931).

As to the second portion of the statute, the Hawaii cases decided under it have been cases of conspiracies having fraudulent or unlawful objectives or fraudulent or unlawful means.[64] Appellees' attack on the *Soga* case (Brief, pp. 69-70) concerns the sufficiency of the evidence to sustain the verdict; the means charged in that case were threats of violence. Unlawful means were charged in Criminal No. 2365, the case here involved (No. 12301, R. 32-34). An unconstitutional construction of the statute could not be assumed any more than in *Musser v. Utah*[65] or *United States v. Petrillo.*[66]

C.

THE QUESTION OF DENIAL OF EQUAL PROTECTION.

The Court below did not find any denial of equal protection. It could not, because the basic elements of a claim of denial of equal protection were not proven.[67]

Appellees do not deny that the basic elements of a claim of denial of equal protection are as set forth in the opening brief, nor could they deny it in view of their own pleadings. (R. 13, subpar. (6); No. 12301,

---

[64]*King v. Anderson and Russell,* 1 Haw. 67 (1851); *King v. Marks,* 1 Haw. 81 (1851); *Territory v. Johnson,* 16 Haw. 743 (1905); *Territory v. Soga,* 20 Haw. 71 (1910); *Territory v. Belliveau,* 23 Haw. 546 (1916), and 24 Haw. 768 (1919); *Territory v. Hart,* 35 Haw. 188 (1939).

[65]333 U.S. 95, 97 (1948).

[66]332 U.S. 1, 11 (1947).

[67]The basic elements of a claim of denial of equal protection are set forth in our Opening Brief, pp. 76-78, and the facts are there reviewed, pp. 78-82.

R. 15.) Appellees make no attempt to show that they met the requirements of proof.

D.

THE 1947 GRAND JURY.

In No. 12300, the grand jury issue is moot (Op. Br. pp. 134-135). Appellees in effect concede this (see last paragraph of Brief, p. 83). In No. 12301 the court below erred in deciding that it could and should pass upon this issue, not only for the reasons set forth in points I and II but also for the reason that a grand jury challenge cannot be initiated collaterally (Op. Br. pp. 137-143).

The Court's conclusion in No. 12301 that the 1947 grand jury list was comprised illegally was based on its findings (R. 505, 509) below considered. The territorial statutes[68] were not under attack and were valid, as shown in the opening brief.[69] The statutes provide for selection of a grand jury list of fifty according to the best judgment of the commissioners, not by lot from all eligibles.

The plan followed by the jury commissioners was one of geographical representation. Unlike the jury commissioners in *Smith v. Texas,*[70] they had a wide acquaintanceship with the people of Maui County, a small rural community. This acquaintanceship extended to persons of many races and in many walks

---

[68]The statutes are printed in the appendix of the Opening Brief, pp. 213-222.

[69]Op. Br. p. 157.

[70]311 U.S. 128 (1940). (Brief, p. 83.)

of life, as shown by the very testimony cited by appellees.[71] The jury commissioners were able to carry out their plan of geographical representation through this wide acquaintanceship and by sending out questionnaires. (R. 703-705, 711-713, 804-805, 832, 888). Appellees have not shown that a plan of geographical representation is forbidden.

(1) The alleged deliberate exclusion of Filipinos.

Appellees rely upon certain cases arising in the southern states, in which a *prima facie* case of discrimination against negroes was presented by means of population statistics, coupled with proof of absence of negroes from juries over a long period of years. (Ans. Br. p. 76.) These cases concerned a citizen group long a part of the community.[72] The eligible Filipino group in Maui County is both recent and minute. For this and other reasons shown in our opening brief, the southern state cases do not apply.[73]

The Court below did not base its opinion on the population statistics. (R. 502-504.) Its conclusion that Filipinos had been deliberately excluded was based solely on nine words from the testimony of Jury Commissioner Augustine Pombo. (R. 504.) These words were removed by the Court from their context, and their meaning thereby changed. From the full testimony on the matter,[74] it appears that Mr. Pombo

---

[71]Brief, p. 83, third paragraph, which evidently refers to R. 806-808, 831-840, 889-914, 715-723, 737-753.

[72]Cf. *Moore v. New York*, 333 U.S. 565, 568 (1948).

[73]Op. Br. pp. 146-147, 152-154.

[74]Op. Br. pp. 150-151, note 138, covering R. 848-850.

testified he picked a man on his merits. The other jury commissioners also testified that no one was rejected by reason of race. (R. 791, 914.) That the jury commissioners had no plan of excluding Filipinos appears from the fact that, in processing the returned questionnaires, they classified at least four Filipinos as qualified. (R. 857, 1514.)

(2) The alleged deliberate weighting of the list in favor of haoles and against wage earners.

Appellees endeavor to present the matter of representation of haoles as a racial issue. (Brief, pp. 78-79.) The Court below deemed this matter incidental to the occupational representation issue. (R. 509.) It will be so treated in this brief.

Appellees attempt to set up a rule of proportionate occupational representation. However, their computations are valueless.[75] Moreover, the proposition is the same one rejected by this Court in *Thiel v. Southern Pacific Co.*[76] and *Local 36 of Internat'l Fishermen v. United States,*[77] rejected by the United States District Court for the northern district of California

---

[75]See Appellees' Brief, pp. 81-82. Appellees have not eliminated non-citizens from the population before computing population percentages; in view of the large number of non-citizen laborers this error is substantial. Their figures deviate from the record; a witness would have to be put on the stand to explain how the figures were "adapted from Table 3". (Brief, p. 81, note 14.) Appellees shift their attack (Brief, p. 88) from the list of fifty to the grand jury panel or array, drawn by lot (R. 1801) from the list of fifty; the record presents no attack upon the panel or array.

[76]169 F.2d 30 (1948), cert. denied 335 U.S. 872, affirming 67 F. Supp. 934 (1946).

[77]177 F.2d 320 (1949), cert. denied 339 U.S. 947, affirming 70 F. Supp. 782 (1947), cited Op. Br. p. 157.

in *United States v. Bridges,*[78] and rejected by the United States District Court for the southern district of New York in *United States v. Foster.*[79] See also *Wong Yim v. United States,* decided by this Court.[80] Appellees rely on *Thiel v. Southern Pacific Co.,* 328 U.S. 217 (1946). (Brief, p. 85.) As held in the later phases of the *Thiel* case, supra, the opinion in 328 U.S. only proscribes deliberate *exclusion* of an economic group.[81]

In an endeavor to show exclusion of an economic group appellees attempt to set up an arbitrary classification of farm laborers. (Brief, pp. 24, 81, 83.) The Court below made no such classification. *Fay v. New York*[82] does not support such classification. At most it suggests a classification composed of union members and wage earners who bargain collectively, of whom there were at least nine on the grand jury list.[83] Hence no exclusion of an occupational group classifiable as such was shown, *a fortiori* no deliberate exclusion of such a group. The record shows that the Maui County jury commissioners did not reject any person because of his race, occupation or economic status. (R. 720-721, 791, 914.)

---

[78]86 F.Supp. 922, 931 (1949).

[79]83 F.Supp. 197, 205 (1949).

[80]118 F.2d 667 (C.A. 9th, 1941), cert. denied 313 U.S. 589.

[81]169 F.2d 30 (1948), cert. denied 335 U.S. 872, affirming 67 F. Supp. 934 (1946). See also Op. Br. p. 158.

[82]332 U.S. 261, 293 (1947), cited by appellees, Brief, p. 83.

[83]Union members Ito (R. 729), Saka (R. 731), Muroki (R. 1037), Rezents (R. 734), Correia (R. 736), and Alu (R. 1036), and three non-union wage earners, Cornwall, Iziku (or Ajifu), and Ayers (R. 1439). But the Court included three of the union members in the employer-entrepreneur group. (Op. Br. p. 156.)

The Court found deliberate weighting, not deliberate exclusion, and based its finding of deliberate weighting on the testimony of Jury Commissioner Pombo. It must be remembered that the Court below was not sitting in Maui County. Nor did the Court have the opportunity usually enjoyed by a trial Court of judging the demeanor of the witness as well as his words; Jury Commissioner Pombo was not on the stand, his testimony having been stipulated into the record, subject to objections to the entire line of testimony concerning the grand jury. (No. 12301, pp. 83-84, R. 1130-1132.) By its misunderstanding of one small bit of Mr. Pombo's testimony, the Court deduced that Mr. Pombo, not a haole himself according to his own classification which is accepted by the Court and appellees (Brief, p. 78, R. 500) was prejudiced in favor of haoles.[84] From Mr. Pombo's opinion that men in business had better heads on them,[85] the Court deduced that Mr. Pombo, for many years a champion of the laboring man and an old-time Democrat (R. 804-805), was prejudiced against laboring men.

Since there were a substantial number of wage earners and union members on the grand jury list, Mr. Pombo's testimony has no more significance than the evidence in the *Thiel* case, decided by this Court,

---

[84]The testimony on which the Court relied appears at R. 830-831, as quoted by the Court at R. 504, note 98, and is reviewed in the Opening Brief, p. 159. Cf. Mr. Pombo's testimony at R. 809-810, 848-849, 875.

[85]The testimony on which the Court relied appears at R. 855, is quoted by the Court at R. 505, and is reviewed in the Opening Brief, pp. 159-160.

where it appeared that half the places on the list were assigned by the clerk to executives or owners of business, and the other half to salaried employees and daily wage earners alike.[86] See also *Local 36 v. United States,* decided by this Court, where the names were derived half from old jury lists and half from sources not representative of lower income groups, such as social registers, the telephone book, and lists submitted by various clubs.[87]

CONCLUSION.

The decrees below, if permitted to stand, would have the effect of authorizing the District Court of Hawaii to interrupt the administration of criminal justice in the territorial Courts to a point where the law enforcement machinery could not function. The decrees were entered in direct violation of the act of Congress and are contrary to settled principles of equity which deny to the federal Courts the power to interfere in criminal proceedings in state and territorial Courts. For the reasons stated above and for the reasons more fully set forth in our opening brief the decrees below should be reversed and the cases

---

[86]See 67 F.Supp. at p. 939, affirmed 169 F.2d 30, supra.
[87]See 70 F.Supp. at pp. 791-792, affirmed 177 F.2d 320, supra.

remanded to the District Court with directions to dismiss the complaints.

Dated, Honolulu, T.H.,
August 9, 1950.

Respectfully submitted,

WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, Appellant in Nos. 12300 and 12301, and JEAN LANE, individually and as Chief of Police of the County of Maui, Appellant in No. 12300,

By J. GARNER ANTHONY,
Special Deputy Attorney General,
By RHODA V. LEWIS,
Assistant Attorney General,
By RICHARD K. SHARPLESS,
Deputy Attorney General,
Attorneys for Appellants.